

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

OMAR LAKEITH BROWN,

Defendant.

Nos. CR-98-0063-FVS

ORDER DENYING DEFENDANT'S
MOTION FOR RE-SENTENCING

THIS MATTER came before the Court on Defendant's motion for "re-sentencing for retroactive application of amendment sentences previously imposed for certain crack cocaine sentences." (Ct. Rec. 80). Assistant United States Attorney Earl Allan Hicks represents the United States, and Defendant is proceeding pro se.

BACKGROUND

On August 6, 1998, Defendant was convicted by a jury of possession with intent to distribute 3.9 grams of cocaine base, a violation of 21 U.S.C. § 841(a)(1). Defendant's base offense level was 22. U.S.S.G. § 2D1.1(9). However, Defendant's sentence was adjusted because he was a career criminal. U.S.S.G. § 4B1.1. The appropriate offense level for a Career Offender, when the statutory maximum sentence for the offense is 20 years, is level 32. *Id.* The Court also determined that a downward departure of four offense levels was warranted based on the incomplete defense of duress. (Ct. Rec. 62

1 at 6); U.S.S.G. § 5K2.12. Defendant's guideline range, based on an
2 adjusted offense level of 28 and a criminal history category of VI,
3 was 140 to 175 months. Defendant was sentenced at the bottom of the
4 guideline range, 140 months incarceration.

5 **DISCUSSION**

6 The Sentencing Guidelines for crack cocaine offenses have been
7 amended. *Guidelines Manual* (2007), Appendix C, Amendment 706. The
8 amendment adjusts downward by two levels the base offense level
9 assigned to each threshold quantity of crack cocaine (Cocaine Base)
10 listed in the Drug Quantity Table in §2D1.1 and provides a mechanism
11 for determining the Guideline range for offenses involving crack
12 cocaine and other substances. This amendment became effective on
13 November 1, 2007. As of March 3, 2008, time reductions for crack
14 cocaine offenders sentenced prior to November 1, 2007 are authorized
15 pursuant to 18 U.S.C. § 3582(c)(2). *U.S. v. Ross*, 511 F.3d 1233, 1237
16 n. 2 (9th Cir. 2008).

17 Defendant's motion for re-sentencing provides no specific request
18 for relief, nor supporting argument. Nevertheless, the Court assumes
19 that Defendant contends his Total Adjusted Offense Level should be
20 reduced two levels based on Amendment 706 to the guidelines. (Ct.
21 Rec. 80).

22 Defendant was convicted by a jury of possession with intent to
23 distribute 3.9 grams of cocaine base and, on November 6, 1998, was
24 sentenced to a term of 140 months imprisonment. The applicable
25 guideline range before any departures was 210 to 262 months derived
26 from a Total Adjusted Offense Level of 32 and a Criminal History

1 Category of VI. The court adopted the Base Offense Level of 22 found
2 by the author of the pre-sentence report based on the quantity of
3 drugs involved. Defendant, however, received a Career Offender
4 enhancement pursuant to U.S.S.G. § 4B1.1 which gave him an offense
5 level of 32 and a Criminal History Category of VI.¹ In order to
6 impose a 140 month sentence within the guidelines, it was necessary
7 for the Court to depart four levels to a Total Adjusted Offense Level
8 of 28 with a guideline range of 140 to 175 months. This was a
9 departure authorized by the guidelines. Defendant did not receive a
10 non-guideline sentence.

11 Because Defendant was sentenced as a Career Offender, his
12 guideline range is unaffected by Amendment 706. In other words, the
13 enhanced offense level of 32 for being a Career Offender is not
14 subject to the two level departure authorized by Amendment 706. The
15 enhancement to a level 32 is not based on the quantity of drugs
16 involved, but rather on Defendant being at least 18 years old at the
17 time he committed the offense of conviction (possession with intent to
18 distribute 3.9 grams of cocaine base), the instant offense was a
19 felony that was a controlled substance offense, Defendant had at least
20 two prior felony convictions of either a crime of violence or a
21 controlled substance offense, and the statutory maximum for the
22 offense of conviction was "20 years or more." See, U.S.S.G. §4B1.1(a)
23 and (b); see, also, *U.S. v. Riviera*, 535 F.Supp.2d 527, 529-539 (E.D.
24 Pa. 2008).

25
26 ¹Based on the number of criminal history points assigned to
Defendant (14), it appears Defendant would have been in Criminal
History Category VI even without the Career Offender enhancement.

1 If an amendment to the guidelines does not change the original
2 sentencing analysis, a motion for reduction of sentence under 18
3 U.S.C. § 3582(c)(2) is properly denied. *United States v. Townsend*, 98
4 F.3d 510, 513 (9th Cir. 1996). Even if Defendant's Base Offense Level
5 had been 20, instead of 22, his Total Offense Level would still have
6 been 32, as required by U.S.S.G. § 4B1.1, resulting in a Total
7 Adjusted Offense Level of 28 and a corresponding guideline range of
8 140 to 175 months. Because a two level reduction in Defendant's Base
9 Offense Level has no effect on the applicable guideline range, there
10 is no basis for reducing Defendant's sentence under 18 U.S.C. §
11 3582(c)(2).

12 For the reasons set forth above, Amendment 706 does not have the
13 effect of lowering Defendant's applicable guideline range. Hence, a
14 reduction of Defendant's sentence is not authorized under §
15 3582(c)(2). Accordingly, Defendant's Motion For Re-Sentencing (**Ct.**
16 **Rec. 80**) is **DENIED**.

17 **IT IS SO ORDERED.** The District Executive shall forward copies of
18 this order to Defendant and to Assistant U.S. Attorney Earl Allan
19 Hicks.

20 **DATED** this 7th day of October, 2008.

21
22 S/Fred Van Sickle
23 Fred Van Sickle
24 Senior United States District Judge
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